Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

Robert Louis Qualia,

Petitioner,

v.

Thomas M. Qualia
and John Qualia,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the Fourth Court of Appeals District of Texas in San Antonio, Texas (Petition for Review by the Supreme Court of Texas Denied)

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. After Petitioner's answer to Respondents' lawsuit was struck by the trial court as a sanction for refusal to make discovery relating to the merits of Respondents' claim, did the subsequent refusal of the trial court to permit Petitioner to raise affirmative defenses (res judicata, limitations, etc.), which were unrelated to and could be determined without reference to the matter as to which discovery was not made, violate Petitioner's right to due process under the Fifth and Fourteenth Amendments to the Constitution, in that no presumption of lack of merit of the affirmative defenses could arise from Petitioner's refusal to permit discovery as to unrelated matters, given that such a presumption is a requisite for striking a litigant's claim or defense for refusal to make discovery? See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

2. After Petitioner was granted leave to file affirmative defenses (res judicata, limitations, etc.), which were unrelated to and could be determined without reference to the matter as to which a prior discovery sanction had been imposed, did the striking of those affirmative defenses as a purported "reinstatement" of the earlier sanction violate Petitioner's right to due process under the Fifth and Fourteenth Amendments to the Constitution? See id.

LIST OF PARTIES

All of the parties in this lawsuit are listed in the caption.

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Robert Louis Qualia,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE FOURTH COURT OF APPEALS DISTRICT OF TEXAS

The Petitioner, ROBERT LOUIS QUALIA, respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the Fourth Court of Appeals District of Texas in San Antonio, Texas, entered on August 5, 1998, and requests that reversal of said judgment be ordered.

OPINIONS BELOW

The 1998 Opinion of the Fourth Court of Appeals affirming, in part, the Judgment of the 83rd District Court of Val Verde County, Texas, is cited as follows: Qualia v. Qualia, No. 04-97-933-CV, 1998 WL 448608 (Tex. App.–San Antonio Aug. 5, 1998, writ denied) (not designated for publication). It appears in the Appendix at 10a-32a.

The 1994 Opinion of the Fourth Court of Appeals reversing the District Court's final summary judgment for lack of subject matter jurisdiction and remanding for trial is cited as follows: Qualia v. Qualia, 878 S.W.2d 339 (Tex. App.–San Antonio 1994, writ denied).

The 1992 Opinion of the Fourth Court of Appeals denying Petitioner's Writ of Mandamus is cited as follows: Qualia v. Thurmond, No. 04-92-272-CV (Tex. App.–San Antonio July 8, 1992, orig. proceeding) (not designated for publication). It appears in the Appendix at 59a-66a.

JURISDICTION

The Judgment of the Court of Appeals of the Fourth Court of Appeals District of Texas was entered on August 5, 1998. (App. at 33a-34a.) On February 18, 1999, Petitioner's Petition for Review was denied by the Supreme Court of Texas. (App. at 3a.) A Motion for Rehearing Petition for Review, timely filed, was overruled on April 15, 1999. (App. at 1a-2a.) The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(a) (West 1993).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the United States Constitution, which provide, in part, respectively, that no person shall "be deprived of life, liberty, or property, without due process of law," and that no State shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT

1. Katherine G. Qualia, the mother of Robert, Thomas and John Qualia, died in 1984. Robert Qualia (Petitioner herein) was appointed Independent Executor of her Estate in the County Court of Val Verde County, Texas (the "Probate Court"). Following the entry of final orders in the Probate Court approving Robert's final account and distribution of the Estate and discharging Robert as Independent Executor, Thomas and John brought this action in the District Court of Val Verde County, Texas (the "District Court"), against Robert, individually and in his capacity as Independent Executor, for conversion, breach of fiduciary duty and negligence.[1] (App. at 80a; Ct.

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[1] An Order Discharging Personal Representative and Closing Estate was entered by the Probate Court on May 12, 1988. (App. at 80a.) On March 8, 1989, Thomas and John obtained an order re-opening the estate for a sixty day period, with the provision that at the end

R. 4-20.) The underlying allegations for all of these theories of recovery were the same and were related to Robert's alleged mishandling of estate assets. (See Ct. R. 4-20; see also App. at 89a-96a.)

On August 29, 1991, the District Court sanctioned Petitioner for refusal to produce certain books and records by, among other things, striking Robert's answer (which at that time, in accordance with Texas practice, consisted only of a general denial, affirmative defenses not then having been pleaded) and entering an interlocutory default judgment against Robert reserving only the issue of damages for trial. (App. at 69a-70a.)

In October 1991, Thomas and John filed a new suit in the County Court at Law of Val Verde County, Texas (the "County Court at Law") against Robert, both in his capacity as Independent Executor and individually, in which they alleged the same facts and the same causes of action, including conversion, against Robert as were asserted against him in this suit. (App. at 81a-96a.) On March 10, 1993, a "take nothing" summary judgment was rendered by the County Court at Law in favor of Robert based on the affirmative defenses of limitations and improper collateral attack on the final orders of the Probate Court. (See App. at 71a-77a.)

Thereafter, just prior to trial (limited to damages with respect to the conversion claim) in the District Court, Robert was granted leave to file an amended answer raising the affirmative defenses of res judicata, collateral estoppel, and limitations. (App. at 50a-51a.) After trial, the District Court struck Robert's amended answer and affirmative defenses and denied his motion for judgment notwithstanding the verdict.[2] (App. at 44a-47a.)

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of that period, the estate would again be closed without further action by the court. (App. at 78a-79a.) The sixty day period ended, and the estate again closed on May 7, 1989. This suit was filed on May 24, 1989. (Ct. R. 4-20.)

[2]Robert's affirmative defenses were established as a matter of law, [see, e.g., App. at 71a-77a (granting motion for summary judgment in the County Court at Law); App. at 42a-45a (j.n.o.v. with respect to claims against executor based on res judicata and limitations); App. at 16a-18a (affirming res judicata determination)]; accordingly, they were not presented to the jury.

The District Court rendered judgment against Robert, on the conversion claim only, for $1,167,058.00 including actual and punitive damages and prejudgment interest. (App. at 35a-41a.) Robert moved for new trial in which he asserted, as he had many times before, that the refusal to hear or the striking of his affirmative defenses as a discovery sanction for conduct that did not relate to those defenses deprived him of due process. (Ct. R. 775-83.)

The Texas Court of Appeals affirmed the District Court's judgment except as to the calculation of prejudgment interest. (App. at 10a-32a.) Concerning the affirmative defenses, the Court of Appeals concluded that the August 29, 1991, discovery sanction order precluded the filing of any further pleadings or answers raising affirmative defenses; accordingly, the appellate court did not reach the constitutional issue presented. (See App. at 23a-24a.) The Texas Supreme Court declined review of that decision. (App. at 1a-3a.)

2. Throughout the proceedings subsequent to the August 29, 1991, sanction order, Robert invoked his Constitutional due process rights with respect to his affirmative defenses. A full chronology which includes excerpts from the record appears in the Appendix beginning at 97a.

In a motion for rehearing[3] on the August 29, 1991, sanction order, Robert raised his due process right to assert the affirmative defense that Thomas and John's claim was barred by the prior, final orders of the Probate Court. Robert argued that "[t]he Order serves to adjudicate Defendant's defenses without consideration of the merits of such defenses and, as such, does not afford Defendant constitutional due process of law." The motion was denied. (App. at 67a-68a.)

Robert then sought mandamus review of the sanction in the Texas Court of Appeals, raising, among other things, the due process argument. The court denied relief. As for the due process argument with respect to Robert's independent affirmative defenses, the court merely stated that the underlying discovery "went to the very heart of the conversion claim" and that "the court's striking of the general denial was not excessive under the circumstances." (App. at 65a.)

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[3]This pleading was inexplicably not found in the court records, but has been added by a stipulation of the parties that is being filed with the Fourth Court of Appeals.

After mandamus was denied, Robert raised his affirmative defenses by filing an amended answer, sought leave to file a pleading raising affirmative defenses, and moved for summary judgment based on those affirmative defenses. (Ct. R. 224-316.) The affirmative defenses were res judicata and collateral estoppel based on the March 10, 1993, judgment of the County Court at Law;[4] improper collateral attack upon the order of the Probate Court; and limitations.

In a Motion for Leave to File Defendant's First Amended Answer, for Reconsideration of Order Striking Defendant's Answer, and for Reconsideration of Denial of Defendant's [Second] Motion for Summary Judgment, Robert raised the due process issue as follows:

> To the extent such sanction was properly imposed upon the presumption that Defendant's defense to Plaintiffs' conversion claims is without merit, such presumption does not and should not extend to Defendant's affirmative defenses of collateral estoppel, res judicata, and limitations, and to deny Defendant the right to assert such affirmative defenses would constitute a denial of Defendant's right to due process ...
>
> * * * * *
>
> ... [T]o prohibit this Defendant from raising affirmative defenses does not flow logically from any presumption that his defense to the Plaintiffs' conversion claim is without merit, since affirmative defenses are in the nature of confession and avoidance, rather than defenses on the merits.

(Ct. R. 527-31.) This motion was denied by the court. (App. at 52a-53a.)

Later, at a hearing on Robert's motion for reconsideration, a different judge allowed Robert to raise his affirmative defenses, (App. at 50a-51a), commenting that

> ... it still seems to me that the remedy that [Thomas and John] obtained, the sanctions, to the point where

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[4]Significantly, the dispositive defense of res judicata arising from the take-nothing judgment in the County Court at Law was not in existence when the August 29, 1991, sanction order was issued.

> [Robert] can't defend the liability, that gives you what you were trying to get out of [the discovery sought]. And then you've gone further and taken away their legal defenses of collateral estoppel and limitation. It seems to be excessive, and I'm not comfortable with it.

(Hearing of January 24, 1997, at 54:6-13.) The affirmative defenses were submitted only to the court, and not to the jury.

After a jury trial, limited to the issue of damages with respect to the conversion claim, the court re-imposed sanctions and struck Robert's affirmative defenses. (App. at 46a-47a.) Robert objected to Thomas and John's motion for judgment based on due process grounds, and, after that motion was overruled, Robert raised the due process issue again in a motion for new trial which was overruled by operation of law. (Ct. R. 755-60, 775-83; App. at 44a-45a.)

Robert appealed the judgment to the Court of Appeals for the Fourth Court of Appeals District of Texas and there asserted that the failure of the court to permit him to raise affirmative defenses violated his right to due process of law. (E.g., Brief for Appellant at 15-18.) The Court of Appeals did not reach this argument in its opinion and upheld the judgment for Thomas and John, holding that, under Texas procedure, the entry of an interlocutory default judgment precluded the raising of all other defenses. (App. at 23a-24a.) Robert moved for rehearing and rehearing en banc in the Court of Appeals, again asserting the due process issue, but such rehearing was denied. (App. at 6a-9a.)

As a final measure in the state courts, Robert sought review in the Supreme Court of Texas, again raising at length the constitutional deprivation that had occurred below, (e.g., Petition for Review at 7-10), but review was denied, as was a subsequent motion for rehearing. (App. at 1a-3a.)

REASONS FOR GRANTING THE WRIT AND FOR REVERSAL

Petitioner, ROBERT LOUIS QUALIA, as a sanction for failure to produce certain records in response to a discovery request, was not allowed to assert affirmative defenses which in no way related to the issues involved in the discovery request. The court granted a default judgment, as to liability, refused to consider the affirmative defenses,

and rendered final judgment against Robert for approximately $1,000,000.

A claim or defense of a civil litigant can be stricken as a discovery sanction, consistent with the right of due process, only when the refusal to make discovery relates to the merits of the claim or defense so as to give rise to a presumption that the claim or defense is without merit. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706 (1982); Hammond Packing Co. v. State of Arkansas, 212 U.S. 322, 351 (1909).

The Texas Court of Appeals decided, in effect, that a "death penalty" sanction in the form of an interlocutory default judgment, if properly granted in light of the pleadings at the time of the sanction, can preclude the subsequent assertion of defenses which otherwise could be asserted but which could not constitutionally have been struck as part of the sanction. This conclusion essentially subordinates federal constitutional rights to state procedural law and should be, but has not been, addressed by this Court. There is presently no clear guidance as to whether due process concerns require that a court reconsider preclusive sanctions that have not become final if valid claims or defenses are brought to the court's attention that are independent of the matters with respect to which the sanctions were imposed.

In addition, given that the record shows that Robert had finally been permitted to assert, and had asserted, his affirmative defenses before trial (and that the interlocutory default judgment had in fact been modified by leave to assert those defenses), and that no presumption of want of merit arose as to the affirmative defenses, the striking of those defenses post-trial sharply conflicts with relevant decisions of this Court. See Bauxites, 456 U.S. 694; Hammond, 212 U.S. 322; Hovey v. Elliott, 167 U.S. 409 (1897).

I.

The Relatedness Requirement for "Death Penalty" Sanctions

With respect to claim- or defense-preclusive sanctions, this Court long ago made it clear that the Constitution requires a particular justification:

> The essential basis for the exercise of power, and not a mere incidental result, arising from its exertion, is the

> criterion by which its validity is to be measured. ... In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce.

Hammond Packing, 212 U.S. at 351 (emphasis added). In order for due process to be satisfied in the issuance of claim- or issue-preclusive sanctions, the behavior of the sanctioned party must satisfy the Hammond presumption. Bauxites, 456 U.S. at 706. This requirement has generally been recognized in Texas. TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 918 (Tex. 1991) ("Discovery sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the discovery process justifies a presumption that its claims or defenses lack merit.").

In appropriate circumstances, then, a court may take facts sought in discovery as established when issuing sanctions with respect to that discovery. See Bauxites, 456 U.S. at 709. But to determine an issue as a discovery sanction on some other basis is "mere punishment," in which due process is "denied by the refusal to hear." Hammond, 212 U.S. at 351; Hovey, 167 U.S. 409 (striking of answer and entry of default as punishment for contempt violated due process); Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc., 682 F.2d 802, 806 (9th Cir. 1982) (entry of default for willful deception of court in order to delay trial was "inconsistent with the requirements of due process").

Thus, for example, if a sanction is levied for violation of an order compelling the production of documents related to a particular counterclaim, the sanction must be specifically related to that counterclaim. United States of America for the Use and Benefit of Wiltec Guam, Inc. v. Kahaluu Constr. Co., Inc., 857 F.2d 600, 602 (9th Cir. 1988). The effect of the sanction – on particular claims, defenses, and counterclaims – cannot extend beyond the preclusion of matters with respect to which the discovery is sought. Bauxites, 456 U.S. at 707 ("[T]he sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery."); see also Schulze v. Coykendall, 545 P.2d 392, 397 (Kan. 1976) ("The federal cases indicate that it is proper to dismiss particular claims or issues for

which discovery or a definite statement is required but not furnished."); Feingold v. Walworth Bros., Inc., 144 N.E. 675, 677 (N.Y. 1924) ("The defendant, by a failure to make proper discovery going to the merits of the entire action, may be precluded from denying the allegations of the complaint, by striking out his denials; but does any legitimate inference follow from such failure that it has not abundant proof to establish its defenses and counterclaims?").

II.

The Refusal to Permit Petitioner to Raise Affirmative Defenses Unrelated to the Discovery Conduct for Which He Was Sanctioned Violated Petitioner's Right to Due Process

Following requests for production of documents made by Thomas and John in discovery, the trial court entered an interlocutory order striking Robert's Answer (a general denial) and granting an interlocutory default judgment against him individually for conversion. (App. at 69a-70a.) The discovery sought related to Robert's Mexican ranching operations and other property that Thomas and John contended was not properly accounted for in the distribution of the estate. (See Ct. R. 49-63.) Although Robert had only pleaded a general denial as of the date of the order, the pleadings in the case had not yet closed. See Tex. R. Civ. P. 63.

For the sake of argument, it is assumed that the materials sought to be discovered related to allegations which, if true, would have established that Robert was liable for conversion and, therefore, that the striking of Robert's general denial was permissible. In fact, this limited assertion was the finding of the Texas appellate court in a mandamus proceeding brought by Robert to challenge the discovery sanction. [App. at 63a-66a ("The documents went to the very heart of the conversion claim, and the court's striking of the general denial was not excessive under the circumstances.").] Although Robert had raised the due process issue with respect to two defenses -- lack of subject matter jurisdiction and improper collateral attack on the final judgment of a probate court -- that court apparently believed that the sanction order based on a general denial was the only matter properly before it in the mandamus proceeding. (See id.)

Prior to bringing the mandamus proceeding, Robert moved for reconsideration of the sanction in the trial court. Notably, even at that early date, and even as the court reconsidered but upheld the sanctions order, the judge strongly intimated that he disagreed with it:[5]

> ...I'm not a lawyer in the case, but if I was taking up that discovery, that sanctions order, the first thing I would say is, [I] had no jurisdiction on that order. I sure would. Then if they – if you get over that hurdle then you can talk about the Trans-America [sic] case. That really concerns me more than the other.

(Hearing of April 20, 1992, at 9:7-13.)

Later in the proceedings, Robert moved to amend his pleadings, seeking to raise the affirmative defenses of limitations and improper collateral attack, (Ct. R. 173-83), and moved for summary judgment on the basis of those defenses, and also the newly-available defenses of res judicata and collateral estoppel,[6] and want of subject matter jurisdiction. (See Ct. R. 191-92.) The trial court granted summary judgment on jurisdictional grounds, but its decision was reversed on appeal. Qualia v. Qualia, 878 S.W.2d 339 (Tex. App.–San Antonio 1994, writ denied) (expressly considering only the jurisdictional issue).[7]

After the original trial judge recused himself, Robert again attempted to raise his dispositive affirmative defenses of limitations, collateral attack, and res judicata in a motion for summary judgment which was denied by the court. (See App. at 54a-58a.) The court later denied Robert's motion for reconsideration of the summary judgment

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[5]In the quoted passage, Judge Thurmond refers to the then-recent decision of TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991), in which a default judgment, imposed as a discovery sanction, was reversed as unjust, taking into account the line of United States Supreme Court decisions beginning with Hovey v. Elliott. TransAmerican was a primary focus of Defendant's Memorandum in support of the Motion for Reconsideration.

[6]At this point, Thomas and John's identical suit against Robert in the County Court at Law had proceeded to a final, take-nothing summary judgment in Robert's favor, based on Robert's defenses of limitations and improper collateral attack. (See App. at 71a-77a.) Thomas and John did not appeal that judgment.

[7]Robert has maintained and continues to maintain that this decision was clearly erroneous.

order and for leave to file amended pleadings, (See Ct. R. 527-39; App. at 52a-53a.)

* * *

It is evident that, in these stages of the proceedings, the court effectively sanctioned Robert repeatedly based on his alleged failure to produce books and records related to estate assets in 1991. However, that conduct – and the books and records sought – had absolutely no bearing on Robert's affirmative defenses of collateral estoppel, res judicata, limitations,[8] and improper collateral attack on the final orders of a probate court. The validity of those defenses could be determined without reference to any source other than the proceedings in the County Court at Law and the Probate Court.[9]

The Constitutional outcome in this case could not be more clear. Robert's right to be heard on the affirmative defenses could not be denied as a discovery sanction consistent with due process, when the sanction was based on conduct and discovery wholly unrelated to those defenses. Bauxites, 456 U.S. at 706-707. Clearly, no presumption arises that Robert's legally-established affirmative defenses were invalid by taking as true any of the facts sought to be discovered from the ranching and related records sought in discovery by Thomas and John. Those records, at best, went to the merits of the conversion claim, and the affirmative defenses, being in the nature of "confession and avoidance," rest on completely independent grounds.

The Court of Appeals declined to address the constitutional issues, apparently in the belief that an interlocutory "death penalty" sanction, even if proper when made, can preclude unrelated, subsequent assertions of meritorious defenses. This case affords this Court an opportunity to hold that such curtailment of a fundamental constitutional right is impermissible.

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[8]Robert's limitations defense was established as a matter of law by, among other things, constructive notice afforded Thomas and John by the estate inventories filed and approved by the Probate Court in 1985 and 1986. (See, e.g., Ct. R. 177-78.)

[9]Robert proffered the relevant evidence from those proceedings both in his motions for summary judgment and as an exhibit in the trial court. (See, e.g., Ct. R. 224-316; Def.'s Ex. 10.)

III.
The Post-Trial "Reinstatement" of Sanctions Striking Affirmative Defenses After the Pre-Trial Assertion of Those Defenses with Leave of Court Violated Petitioner's Right to Due Process

Immediately prior to trial, and before a different judge, Robert was granted leave to raise affirmative defenses. (App. at 50a-51a.) The court's order granting leave, however, also provided that the filing of an amended answer "does not set aside the default judgment granted against [Robert] pursuant to the [August 29, 1991, sanctions order]." (Id.)

The impact of the order, nonetheless, was to modify the default judgment into a finding of liability for conversion on the merits only, subject to Robert's affirmative defenses, as evidenced by the comments of the judge at the hearing leading to the granting of leave to file the amended answer raising the affirmative defenses:

> THE COURT: ... [B]ut it still seems to me that the remedy that you obtained, the sanctions, to the point where [Robert] can't defend the liability, that gives you what you were trying to get out of [the discovery sought]. And then you've gone further and taken away their legal defenses of collateral estoppel and limitations. It seems to be excessive, and I'm not comfortable with it. ...
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> * * * * *
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> THE COURT: ...[Y]ou wanted the books so you could prove liability. Well, in essence [Judge Thurmond] gave you the liability. And looks like he's gone further. He didn't go further because at the time, that was all that was before him. ... But now we do have these pleas in bar, at bar, whatever it's called, and by including those, I think we've gone too far.
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> * * * * *
>
> THE COURT: I'm going to allow the affirmative defenses. That's it.

(Hearing of January 24, 1997, at 54:6-13, 55:4-11, and 63:5-6.)

Counsel for Thomas and John fully understood the effect of the ruling, as reflected in the following passage from a letter to the judge dated prior to the issuance of the written order:

> You stated several times that you are not going behind Judge Thurmond's Order. However, by granting the Defendant his Answer, you are doing precisely that. One cannot have a Default Judgment against him on the one hand and new defenses on the other hand.

(Letter from James L. Drought to the Honorable Robert L. Eschenburg dated January 22, 1997, at 4; Ct. R. 660.) With leave of court, Robert promptly filed an amended answer asserting the affirmative defenses of limitations, improper collateral attack, collateral estoppel, and res judicata. (Ct. R. 675-95.)

Under Texas law, Judge Eschenburg, as the trial judge, "retain[ed] continuing control over interlocutory orders and [had] the power to set those orders aside any time before a final judgment [was] entered." Fruehauf Corp. v. Carrillo, 848 S.W.2d 83, 84 (Tex. 1993); Velez v. de Lara, 905 S.W.2d 43, 45 (Tex. App.–San Antonio 1995, no writ) (holding that "jurisdiction to reconsider an interlocutory ruling is vested in the court rather than the individual judge" and that a district judge could modify a prior interlocutory sanctions order by a previous district judge on the case). He had full authority to grant leave for the pleading of Robert's affirmative defenses to the conversion claim.

Unfortunately, proper treatment of Robert's affirmative defenses was short-lived, because Judge Eschenburg again sanctioned Robert, based on nothing other than the August 29, 1991, "death penalty" sanction when, after trial, in connection with the parties' post-trial motions, the judge granted Thomas and John's motion to "reinstate sanctions." (App. at 46a-47a.) In doing so, he explained that he was taking this action not because he thought it was right, but because it was the only way to ensure appellate review of the issue:

> THE COURT: The reason that I want to reconsider or take another look at the sanctions is I think I'm right. I'm 99 percent sure I'm right, but if I'm wrong, the Fourth Court [of Appeals] can't correct it because there's no right of appeal. Whereas if I reinstate the

> sanctions and I am wrong, the Fourth Court will reverse and take care of that matter.
>
> That's the only reason that I will do it because I think I'm right. I think [the sanctions] go too far. And if I do reinstate sanctions, it's just because – not that I think I ruled wrong, but to give the plaintiffs a chance to have a Fourth Court ruling. ...

(Hearing of March 13, 1997, at 3:13-24.) When Judge Eschenburg issued the sanction, Robert's then-asserted affirmative defenses to the conversion claim were struck. (App. at 46a.)

As explained, the striking of Robert's affirmative defenses based on conduct during discovery, unrelated to those defenses, worked to deprive Robert of property (i.e., by the rendition of a judgment against him) without due process of law. See Bauxites, 456 U.S. at 705-07; Kahaluu Constr., 857 F.2d at 602. Since the sanction was for conduct unrelated to the affirmative defenses, the striking of those defenses was "mere punishment," and was constitutionally impermissible. See Hammond, 212 U.S. at 351.

At the point where Robert's affirmative defenses were in place with leave of court, Thomas and John should not have been able to invoke the interlocutory default judgment from the August 29, 1991 order, because it had been modified into a finding of liability on the merits of the conversion claim subject to the affirmative defenses. Regardless, the 1991 interlocutory order should not and, constitutionally, could not have been used to prohibit Petitioner from raising his affirmative defenses.

IV.
The Opinion of the Court of Appeals of the Fourth Court of Appeals District of Texas

The state appellate court, in the opinion and judgment with respect to which Robert seeks a writ of certiorari from this Court, decided that the trial court could not entertain any defenses to the conversion claim after the entry of an interlocutory default judgment on that claim in the August 29, 1991, order. (App. at 23a-24a.) The court ruled that

> Robert's liability on the conversion claim was prescribed by the striking of his answer to that claim and entry of default judgment against him. Therefore, the entry of default judgment against Robert in his individual capacity on the conversion claim was a final disposition of that claim, leaving only the issue of damages to be litigated and precluding the filing of any further pleadings or answers raising affirmative defenses.

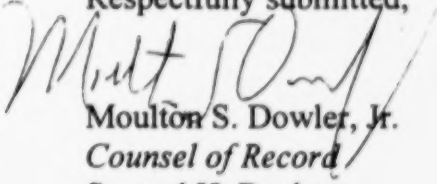
(App. at 24a.)

The appellate ruling improperly avoided the Constitutional inquiry by focusing on the initial point of sanction. As urged above, the guidance of this Court is needed to address the dominance of due process concerns in ongoing proceedings, and to clarify that "death penalty" sanctions which have not become final may require modification in light of subsequent assertions of fundamental due process rights.

CONCLUSION

Accordingly, this Petition for Writ of Certiorari should be granted and the decision of the Court of Appeals for the Fourth Court of Appeals District of Texas should be reversed.

Respectfully submitted,



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